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## Ling Haw Cheun v Public Prosecutor

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COURT OF APPEAL (KUCHING) — CRIMINAL APPEAL NO Q-05–109–04 OF 2014
ZAWAWI SALLEH, IDRUS HARUN AND ABDUL RAHMAN SEBLI JJCA
2 JULY 2015

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*Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused convicted for charge of trafficking in dangerous drugs — Sentenced to death — Defence of no knowledge — Whether probable — Whether knowledge proved — Failure to call material witness — Whether adverse inference ought to be invoked — Whether trial judge thoroughly considered defence explanation — Dangerous Drugs Act 1952*

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In the High Court, the appellant was charged with trafficking in dangerous drugs. The police had followed the appellant's car until it stopped and parked at the parcel section of Vital Focus Transportation ('VFT') located at the bus terminal. There was a lady in the car ('Ofelia'). On his arrival at the bus terminal, the appellant alighted from the car through the driver's door and proceeded straight to the parcel collection section of VFT. As soon as he reached the counter, he pointed to a box ('P12'). After collecting P12, the appellant headed back towards the car holding the box with both hands. As the appellant was about to enter the car, the police stopped him and startled, the appellant threw the box onto the driver's seat of the car. Both the appellant and Ofelia were arrested. PW6 administered statutory caution under s 37A(1)(b) of the Dangerous Drugs Act 1952 ('the DDA'). The appellant then gave his statement ('P13') to PW6 but refused to sign the statement. Among the items found in the box was one black plastic bag ('P18') containing five transparent plastic packets of crystalline substances suspected to be syabu. In his defence, the appellant did not deny collecting P12 from the terminal but claimed that it was at the request of Ofelia who told him that Ah Kiong asked her to collect it. In short he was just doing Ofelia a favour, nothing more nothing less. As to why he threw the box onto the car seat, his explanation was that it was because he was 'shocked' when someone suddenly stopped him from behind. The appellant denied knowledge of the drugs. The High Court found the appellant guilty and convicted him for the offence. The appellant was sentenced to death. In this appeal, the appellant submitted that the trial judge erred in finding that knowledge had been proved; the trial judge erred in failing to draw adverse inference against the prosecution for failing to call Ofelia; and the defence explanation was not 'thoroughly' considered by the trial judge.

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**Held**, dismissing the appeal:

(1) There is no dispute that the drug was in the appellant's physical custody and control at the time of the appellant's arrest. This established the first of the twin elements of 'possession' as the word is understood in criminal law. As for the second element of possession, which is knowledge of the thing possessed, the trial judge's finding was based on inferences from the acts and conduct of the appellant. As actual possession (as opposed to presumed possession) had been proved against the appellant, the trial judge was therefore correct in invoking the presumption of trafficking under s 37(da). In fact she had no discretion not to do so as the weight of the drug exceeded the minimum prescribed by s 37(da)(xvi) of the DDA (see paras 24–25 & 28).

(2) In a drug trafficking charge, clearly knowledge is a necessary factual ingredient of the offence. Without proof of knowledge, there can be no possession in the criminal sense and without proof of possession there can be no trafficking. For all intents and purposes, the defence of no knowledge is a defence that the accused was not even in possession of the drug. The defence had nothing to do with rebutting the presumption of trafficking under s 37(da). Therefore, where no knowledge is raised as a defence and the accused fails to prove the defence on the balance of probabilities, he must as a matter of law be convicted of the offence charged, which is trafficking (see para 62).

(3) The appellant was called upon to answer a trafficking charge and not a possession charge. His defence must therefore be directed at rebutting the presumption of trafficking rather than to try to convince the court that he was not in possession by reason of having no knowledge of the drug. Since he chose to put up the defence of no knowledge, then he must prove it on the balance of probabilities (see para 65).

(4) Unless it could be shown that the prosecution was actuated by oblique motive and was suppressing evidence favourable to the appellant, no adverse inference should be drawn against the prosecution. There was no such suggestion in this case. More importantly, even without the evidence of Ofelia, the prosecution already had sufficient credible evidence to establish a prima facie case against the appellant at the close of its case. No adverse inference could be drawn against the prosecution for failure to call a witness when the prosecution had discharged its burden (see para 69).

**[Bahasa Malaysia summary**

Di Mahkamah Tinggi, perayu telah dituduh mengedar dadah berbahaya. Polis telah mengekori kereta perayu sehingga ia berhenti dan meletakkan kereta di bahagian petak Vital Focus Transportation ('VTF') yang terletk di terminal bas. Terdapat seorang perempuan di dalam kereta ('Ofelia'). Ketika dia sampai

di terminal bas, perayu turun daripada kereta melalui pintu kereta pemandu dan berjalan terus ke bahagian kutipan bungkusan VTF. Sebaik sahaja dia tiba di kaunter, dia menunjukkan ke arah sebuah kotak ('P12'). Selepas mengambil P12, perayu kembali semula ke kereta sambil memegang kotak dengan kedua tangannya. Ketika perayu hendak memasuki kereta, pihak polis telah menahannya dan apabila terkejut, perayu mencampakkan kotak ke atas tempat duduk pemandu. Kedua-dua perayu dan Ofelia ditahan. PW6 menggunakan statutori berkanun di bawah s 37A(1)(b) Akta Dadah Berbahaya 1952 ('ADB'). Perayu kemudian memberikan kenyataannya ('P13') kepada PW6 tetapi enggan menandatangani kenyataan itu. Antara barang yang terdapat dalam kotak itu adalah satu beg plastik hitam ('P18') yang mengandungi lima paket plastik lutsinar bahan kristal disyaki syabu. Dalam pembelaannya, perayu tidak menafikan mengambil P12 dari terminal tetapi mendakwa bahawa ia adalah atas permintaan Ofelia yang memberitahunya bahawa Ah Kiong meminta dia untuk mengambilnya. Pendek kata dia hanya melakukan pertolongan untuk Ofeliat, tidak lebih tidak kurang. Mengapa dia mencampakkan kotak ke tempat duduk kereta, penjelasannya adalah bahawa ia adalah kerana dia 'shocked' apabila seseorang tiba-tiba berhenti dari belakang. Perayu menafikan pengetahuan tentang dadah. Mahkamah Tinggi mendapati perayu bersalah dan disabitkan bagi kesalahan itu. Perayu dijatuhi hukuman mati. Dalam rayuan ini, perayu berhujah bahawa hakim perbicaraan terkhilaf dalam dapatan pengetahuan yang telah dibuktikan; hakim perbicaraan terkhilaf apabila gagal untuk membuat kesimpulan bertentangan terhadap pihak pendakwaan kerana gagal memanggil Ofelia; dan penjelasan pembelaan tidak 'thoroughly' dipertimbangkan oleh hakim perbicaraan.

**Diputuskan**, rayuan ditolak:

(1) Tiada pertikaian bahawa dadah adalah dalam jagaan fizikal dan kawalan perayu pada masa penahanan perayu. Ini membuktikan elemen pertama lemen berkembar 'posession' sebagai perkataan yang difahami dalam undang-undang jenayah. Bagi elemen kedua pemilikan, iaitu pengetahuan mengenai perkara yang dimiliki, dapatan hakim perbicaraan itu berdasarkan kesimpulan dari perbuatan dan kelakuan perayu. Seperti yang milikan sebenar (bertentangan dengan milikan yang anggapan) telah dibuktikan terhadap perayu, hakim perbicaraan oleh itu betul dalam mengguna pakai anggapan pengedaran di bawah s 37 (da). Malah dia tidak mempunyai budi bicara untuk tidak berbuat demikian kerana berat dadah melebihi minimum yang ditetapkan oleh s 37 (da) (xvi) daripada ADB (lihat perenggan 24–25 & 28).

(2) Dalam tuduhan mengedar dadah, jelas pengetahuan adalah bahan fakta yang diperlukan kesalahan itu. Tanpa bukti pengetahuan, tidak ada apa-apa pemilikan dalam erti kata jenayah dan tanpa bukti pemilikan tidak ada apa-apa pengedaran. Untuk tujuan dan maksud, pembelaan tiada pengetahuan adalah suatu pembelaan bahawa tertuduh tidak pun

memiliki dadah. Pihak pembelaan tidak mempunyai apa-apa kaitan dengan menyangkal anggapan pengedaran di bawah s 37(da). Oleh itu, jika tiada pengetahuan dibangkitkan sebagai pembelaan dan tertuduh gagal membuktikan pembelaan atas imbangan kebarangkalian, dia mesti sebagai satu undang-undang boleh disabitkan atas kesalahan yang dipertuduhkan, yang mengedar (lihat perenggan 62).

(3) Perayu telah diminta untuk menjawab tuduhan mengedar dan bukan caj pemilikan. Pembelaannya oleh itu mesti ditujukan menyangkal anggapan pengedaran dan bukan cuba untuk meyakinkan mahkamah bahawa dia tidak memiliki atas sebab tidak mempunyai pengetahuan tentang dadah. Oleh kerana dia memilih untuk meletakkan pembelaan tiada pengetahuan, maka dia mesti membuktikan pada imbangan kebarangkalian (lihat perenggan 65).

(4) Melainkan jika ia boleh ditunjukkan bahawa pihak pendakwaan telah didorong oleh motif serong dan adalah seorang yang menahan keterangan yang memihak kepada perayu, tiada sangkaan bertentangan patut dibuat terhadap pihak pendakwaan. Tidak ada apa-apa cadangan dalam kes ini. Lebih penting lagi, walaupun tanpa keterangan Ofelia, pihak pendakwaan sudah mempunyai bukti kukuh yang mencukupi untuk membuktikan kes prima facie terhadap perayu pada penutup kesnya. Tiada sangkaan bertentangan dapat dibuat terhadap pendakwaan bagi kegagalan untuk memanggil saksi apabila pihak pendakwaan telah melepaskan bebannya (lihat perenggan 69). ]]

**Notes**

For cases on appeal against conviction and sentence, see 5 *Mallal's Digest* (5th Ed, 2015) paras 301–419.

**Cases referred to**

*Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209, FC (refd)
*Baharom v PP* [1960] 1 MLJ 249; [1960] 1 LNS 9, CA (refd)
*Chan Pean Leon v PP* [1956] 1 MLJ 237; [1956] 1 LNS 17 (refd)
*Chu Tak Fai v PP* [1998] 4 MLJ 246; [1998] 4 CLJ 789, CA (refd)
*Chua Keem Long v PP* [1996] 1 SLR 510, HC (refd)
*Cohen Lorraine Philis & Anor v PP and another appeal* [1989] 3 MLJ 289; [1989] 1 CLJ Rep 18, SC (refd)
*Emmanuel Yaw Teiku v PP* [2006] 5 MLJ 209; [2006] 3 CLJ 597, FC (refd)
*Isidro Leonardo Quito Cruz v PP* [2013] 2 MLJ 1, FC (refd)
*Leow Nghee Lim v Reg* [1956] 1 MLJ 28; [1955] 1 LNS 53 (refd)
*Liew Siew & Anor v PP* [1969] 2 MLJ 232; [1969] 1 LNS 90 (refd)
*Mat v PP* [1963] 1 MLJ 263; [1963] 1 LNS 82 (refd)
*Muhammed bin Hassan v PP* [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
*Ng Chai Kem lwn Pendakwa Raya* [1994] 2 MLJ 210; [1994] 2 CLJ 593, SC (refd)

*Ng Eng Kooi & Anor v PP* [1970] 1 MLJ 267, FC (refd)
*Ong Hooi Beng & Ors v PP* [2015] 3 MLJ 812; [2015] 3 AMR 449, CA (refd)
*PP v Abdul Rahman Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
*PP v Yuvaraj* [1969] 2 MLJ 89; [1968] 1 LNS 116, PC (refd)
*PP v Zulkifli bin Arshad* [2011] 1 MLJ 599; [2010] 6 CLJ 121, FC (refd)
*Parlan bin Dadeh v PP* [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
*Siew Yoke Keong v PP* [2013] 3 MLJ 630, FC (refd)
*Toh Ah Loh and Mak Thim v Rex* [1949] 1 MLJ 54; [1948] 1 LNS 72 (refd)
*Wong Swee Chin v PP* [1981] 1 MLJ 212; [1980] 1 LNS 138, FC (refd)

**Legislation referred to**

Dangerous Drugs Act 1952 ss 12(2), 37(d), 37(da), 37(da)(xvi), 37A(1)(b), 39A, First Schedule (Part III)
Evidence Act 1950 ss 9, 114, 114(g)
Singapore Misuse of Drugs Act 1973 s 15(c)

**Appeal from:** Criminal Trial No SBW-45–18/12 of 2012 (High Court, Sibu)

*Major Haji Mohd Osman bin Ibrahim (Osman Ibrahim & Co) for the appellant.*
*Samihah bt Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Abdul Rahman Sebli JCA:**

THE CHARGE

**[1]** In the High Court at Sibu, Sarawak, the appellant was charged with trafficking in a dangerous drug and the charge against him was as follows:

> Bahawa kamu pada 25.7.2012 jam lebih kurang 09.20 pagi, bertempat di belakang Vital Focus Transportation Sdn Bhd Terminal Bus, Jalan Pahlawan, Sibu, di dalam Daerah Sibu, di dalam Negeri Sarawak, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 184.88 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952 .

**[2]** He claimed trial to the charge at the conclusion of which he was found guilty and sentenced to death. This is his appeal against the conviction. Having heard arguments from both sides we dismissed the appeal by a unanimous decision. These are our grounds for dismissing the appeal. My learned brothers Justice Zawawi Salleh and Justice Idrus Harun have read this judgment and have approved the same.

A THE BACKGROUND FACTS

**[3]** The facts are quite straightforward and can be summarised as follows. On 25 July 2012 at about 9.10am Detective Abdul Yaacub bin Sahari ('PW4') and two of his colleagues followed the appellant's car bearing registration No QSV7800 until it stopped and parked at the parcel section of Vital Focus Transportation ('VFT') located at the bus terminal, Jalan Pahlawan 7B Sibu. There was another person inside the car, a lady by the name of Ofelia. She was the appellant's girlfriend.

**[4]** On his arrival at the bus terminal, the appellant alighted from the car through the driver's door and proceeded straight to the parcel collection section of VFT. As soon as he reached the counter, he pointed to a box ('P12') with the consignment number 213571 which was lying on the floor. He then showed to the clerk on duty ('PW3') a text message in his handphone which displayed the consignment number 213571.

**[5]** PW3 asked the appellant to produce his identity card,which the appellant did, and she duly recorded the identity card number in the company's record book ('P11'). The appellant himself wrote down his phone number 0109712255 on the record book.

**[6]** After collecting P12, the appellant headed back towards the car holding the box with both hands. Ofelia was seated at the passenger seat. As the appellant was about to enter the car, PW4 stopped him and introduced himself as a police officer. Startled by the sudden appearance of the police, the appellant threw the box onto the driver's seat of the car.

**[7]** When PW4 tried to arrest him by holding his hand, the appellant resisted by stiffening his body and hands and tried to step away from the car. He was however detained and handcuffed by PW4 with the assistance of his two colleagues. Ofelia was also arrested. A short while later PW4's superior officer Insp Lee Beng Oui ('PW6') arrived on the scene.

**[8]** PW6 took out P12 from the car and called both the appellant and Ofelia to witness the inspection of the box. Before that he administered the statutory caution under s 37A(1)(b) of the Dangerous Drugs Act 1952 ('the DDA'). The appellant then gave his statement ('P13') to PW6. The questions and answers proceeded as follows:

S: Adakah kotak itu kamu ambil sendiri di kaunter.

J: Ya.

S: Siapakah pemilik sebenar kotak tersebut?

J: Ah Kiong.

S: Ah Kiong ada bersama kamu?

J: Tiada.

S: Apa yang ada dalam kotak tersebut?

J: Tidak tahu.

**[9]** The appellant however refused to sign the statement. PW6 then opened the box in the presence of both the appellant and Ofelia. Among the items found in the box was one black plastic bag ('P18') containing five transparent plastic packets (P19 (a)-(e)) containing crystalline substances suspected to be syabu.

**[10]** At his office after returning from the scene, PW6 weighed the five transparent plastic packets together with the contents and they recorded a gross weight of 253.67g. When asked why he weighed the exhibits, PW6 said it was to classify under which section of the DDA were the arrests made.

**[11]** The drug exhibits were sent to the Chemistry Department for analysis and were confirmed by the Forensic Science Officer Rubeshan a/l Shamugam ('PW7') to contain 184.88g of methamphetamine, a dangerous drug listed in the First Schedule (Part III) of the DDA. There was no challenge to this part of PW7's evidence and no reason was given as to why this was not done. The evidence is therefore deemed to be admitted: *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1980] 1 LNS 138.

**[12]** In saying this we are of course mindful of the rule that failure by the defence to put its case to the prosecution witnesses can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt: see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209.

**[13]** A person found in possession without lawful authority of 50g or more in weight of this type of drug (methamphetamine) is presumed to be trafficking in the drug 'unless the contrary is proved' (s 37(da)(xvi) of the DDA).

THE DEFENCE CASE

**[14]** On these primary facts the learned trial judge found, and rightly so in our view, that a prima facie case of trafficking had been established against the appellant. The appellant was then called upon to enter his defence to the trafficking charge. He chose to give sworn evidence. His story was that on the morning of his arrest, he had gone out to the bus terminal together with Ofelia using his brother's car. The purpose of going to the bus terminal was to collect something belonging to Ofelia's friend by the name of 'Ah Kiong'.

**[15]** The appellant did not deny collecting P12 from the terminal but claimed that it was at the request of Ofelia who told him that Ah Kiong asked her to collect it. In short he was just doing Ofelia a favour, nothing more nothing less. As to why he threw the box onto the car seat, his explanation was that it was because he was 'shocked' when someone suddenly stopped him from behind.

**[16]** The appellant called his younger brother Ling Haw Hiong ('DW2') as a witness but the only significance of his evidence is that the car that the appellant was using that morning 'to collect thing' at the bus station belonged to him.

**[17]** Like in most drug trafficking cases, the appellant's defence was that he had no knowledge of the drug, and not that he was not trafficking in the drug in rebuttal of the presumption under s 37(da) of the DDA, which applied against him. If his claim is true, ie that he had no knowledge of the drug, he committed no offence under the DDA, not even the lesser offence of possession under s 12(2) read with s 39A because without proof of knowledge, mere physical possession is not a crime. He would be entitled to an outright acquittal.

**[18]** The defence of no knowledgeis therefore a complete defence to a trafficking charge. It is a defence of total avoidance, unlike the defence raised by the accused in *Cohen Lorraine Philis & Anor v Public Prosecutor and another appeal* [1989] 3 MLJ 289; [1989] 1 CLJ Rep 18 where possession was admitted but not trafficking. It was a defence of confession and avoidance: confessing to possession but avoiding liability for trafficking.

**[19]** The thrust of the defence in that case was that the drug was for the accused's own personal consumption and not for the purpose of trafficking. The accused failed in the High Court but succeeded in the Supreme Court where her conviction for trafficking was set aside and substituted with a conviction for possession under s 39A of the DDA.

**[20]** This case shows that possession and trafficking are two distinct offences and must be considered in two separate exercises at the close of the defence case. A person who traffics must necessarily be in possession of the drug but a person who is in possession need not necessarily be trafficking in the drug. Where the accused succeeds in rebutting the presumption of trafficking but possession remains proved or is admitted, he can only be convicted of the offence of possession.

THE APPEAL

**[21]** Before us the appellant advanced 11 grounds of appeal but in our view they can be compressed into three broad grounds, firstly that the learned trial judge erred in finding that knowledge had been proved, secondly that the learned trial judge erred in failing to draw adverse inference against the prosecution for failing to call Ofelia, and thirdly that the defence explanation was not 'thoroughly' considered by the learned trial judge.

*First ground*

**[22]** Basically the appellant's argument in relation to the first ground is that since knowledge was not proved, the appellant was not in mens rea possession of the drug, and since he was not in mens rea possession of the drug, he could not be presumed to be trafficking under s 37(da) of the DDA. Therefore the learned trial judge was wrong in invoking the presumption of trafficking.The equation cannot be simpler than that.

**[23]** Whether or not the appellant had knowledge of the drug is primarily a question of fact for the trial judge to determine. In this regard the learned trial judge's finding was that the appellant had knowledge of the drug and was therefore in actual or mens rea possession of the drug. We have no reason to disturb this finding of fact. It is clear that her finding is amply supported by the evidence.

**[24]** There is no dispute that the drug was in the appellant's physical custody and control at the time of his arrest. This established the first of the twin elements of 'possession' as the word is understood in criminal law: *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17; *Toh Ah Loh and Mak Thim v Rex* [1949] 1 MLJ 54; [1948] 1 LNS 72; *Leow Nghee Lim v Reg* [1956] 1 MLJ 28; [1955] 1 LNS 53.

**[25]** As for the second element of possession, which is knowledge of the thing possessed, the learned judge's finding was based on inferences from the following acts and conduct of the appellant:

(a) the appellant straightaway pointed to the box P12 which was lying on the floor of the VFT counter;

(b) the appellant himself wrote down his phone number on the record book P11;

(c) the appellant threw the box on the driver's seat of the car upon being approached by the police; and

(d) the appellant stiffened his hands whilst stepping backwards away from the car.

**[26]** On such evidence before her, the learned trial judge was perfectly entitled to arrive at the finding of knowledge. The combined effect of these strands of evidence is that the appellant knew about the drug. Learned counsel for the appellant submitted that the appellant's conduct of stiffening his body and hands and moving to the rear of the car in order to get away cannot be held against the appellant as it was an 'exaggeration' and 'not corroborated' by other evidence. With due respect to learned counsel the submission is without any legal or factual basis.

**[27]** The learned trial judge rightly referred to the Federal Court decision in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 for the proposition that it is not for the court to explain away the accused's conduct by offering an explanation which is consistent with the innocence of the accused. The explanation must come from the accused himself as required by s 9 of the Evidence Act 1950 ('the Evidence Act').

**[28]** As actual possession (as opposed to presumed possession) had been proved against the appellant, the learned trial judge was therefore correct in invoking the presumption of trafficking under s 37(da). In fact she had no discretion not to do so as the weight of the drug exceeded the minimum prescribed by s 37(da)(xvi) of the DDA: see *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599; [2010] 6 CLJ 121 ('*Zulkifli Arshad*') where the Federal Court said at p 608 (MLJ); p 131 (CLJ):

> We are of the view that having been established as a fact by the trial judge that there was actual possession of the drugs by the respondent, the weight of which exceeded 200g of cannabis, *then the statutory presumption under s 37(da) must come into play* since it provides:
>
> (da) any person found in possession of ...
>
> (vi) 200 grams or more in weight of cannabis; other than in accordance with the authority of this Act or any other written law, *shall be presumed, until the contrary is proved, to be trafficking* in the said drug. (Emphasis added.)

**[29]** In that case, despite actual possession of more than 200g of cannabis having been proved against the accused, both the High Court and the Court of Appeal failed to invoke the presumption under s 37(da) of the DDA. This prompted the Federal Court to make the following remarks at p 609 (MLJ); p 133 (CLJ):

> The same applies to the failure of the Court of Appeal for not applying the presumption under s 37(da)(vi). Be that as it may, we feel that on the evidence adduced by the prosecution, and upon the failure by the learned trial judge as well

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as the Court of Appeal to invoke the presumption, *it is incumbent upon us to do soin accordance with the provision of s 37(da)(vi) of the Act.* (Emphasis added.)

B

**[30]** It is clear from the judgment that once the factum of possession of more than the prescribed amount of scheduled drug has been proved, it is 'incumbent' on the court to invoke the presumption of trafficking. What it means in simple language is that the court must invoke the presumption. If it is incumbent on the Federal Court, it is incumbent on all courts below the Federal Court. There can be no argument that this part of the apex court's decision forms part of the ratio decidendi of the case. To omit invoking the presumption would be to violate the doctrine of stare decisis.

C

*Whether presumption of knowledge to be invoked*

D

**[31]** Given the fact that actual custody and control had been proved against the appellant, the question is whether it was incumbent on the court, including this court, to invoke the presumption of knowledge under s 37(d). It is important to note that there are two parts to s 37(d). The first presumes 'possession' and the second presumes knowledge as to the nature of the drug. We reproduce below the relevant part of the provision:

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(d) any person who is found to have in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in *possession* of such drug andshall, until the contrary is proved, be deemedto have *known the nature* of such drug. (Emphasis added.)

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**[32]** It can be seen at once that the presumption under the second part is more specific and is couched in stronger language than the presumption in the first part, which merely presumes 'possession'. The effect of the second part of the presumption is that a person who is found in custody or control of any proscribed drug is presumed, until the contrary is proved, to have known the nature of the drug. Weight is not a factor.

G

**[33]** We venture to say that the presumption of 'possession' in the first part of s 37(d) makes no sense because possession as mentioned earlier consists of two elements, namely physical possession and knowledge of the thing possessed. It is absurd to presume the physical element of possession because a person who is found in physical custody or control of the drug would already be in physical possession of the drug.

H

I

**[34]** It is the second part of s 37(d) that actually presumes 'possession' because by being presumed to have had knowledge of the nature of the drug, the person found in custody or control of the drug would then be in mens rea possession of the drug, the physical element being physical custody or control

and the mental element being knowledge as to the nature of the drug, which the law presumes.

**[35]** Can the first and second parts of s 37(da) be read in one breadth, meaning to say, since the accused is deemed to be in 'possession' of the drug upon proof of custody or control, he is then deemed, for the second time, to have had knowledge of the nature of the drug? We do not think so because that will be a presumption upon presumption and will offend the rule against double presumption.

**[36]** We appreciate that the Federal Court in *Zulkifli Arshad* was dealing with the presumption of trafficking under s 37(da) and not the presumption of knowledge under s 37(da) but in our view the ratio decidendi extends to the presumption under s 37(d). It is to be noted that the operative words in both s 37(d) and s 37(da) are similar word for word, ie 'until the contrary is proved'.

**[37]** The effect of these words is that unless and until the accused discharges his burden of proof, the court must act on the supposition that the presumed facts are true. It is a supposition of law and as such it is not open to the judge nor the public prosecutor to choose whether to invoke or not to invokethe presumptions and this is so even where there is actual evidence of knowledge or trafficking. To do so would be to ignore the law. The court's duty is to give effect to the law, not to stifle it or to give it a construction that will defeat its object.

**[38]** This in our humble and respectful opinion answers the view that the statutory presumptions are there merely as an aid to the prosecution and as such it is entirely up to the prosecution to decide whether or not to call the presumptions in aid in support of its case.

**[39]** If Parliament had intended to give the court the discretion whether to invoke or not to invoke the presumptions once the facts that trigger their activations are established, it would have used the word 'may' instead of 'shall' in both s 37(d) and s 37(da). Such word can be found in many statutes. One example that comes to mind is s 114 of the Evidence Act which deals with the drawing of inferences.

**[40]** The use of the word 'shall' immediately preceding the words 'until the contrary is proved' in both s 37(d) and s 37(da) dispels any notion that the court is vested with such discretion. Chong Siew Fai CJ (Sabah and Sarawak) in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 ('*Muhammed Hassan*') aptly described the presumptions as 'compelling presumptions' which must be invoked.

**[41]** Having regard to the legislative scheme of s 37(d) and (da), we are of the

view that in drug trafficking cases both presumptions are applicable side by side, provided the facts that trigger their applications are established at the close of the prosecution's case. What the law prohibits is to use the presumption of 'possession' under s 37(d) to invoke the presumption of trafficking under s 37(da).

**[42]** It is to be noted that the factual elements that trigger the application of these two presumptions are different. The presumption of knowledge under s 37(d) is triggered by proof of custody or control whereas the presumption of trafficking under s 37(da) kicks in by proof of possession. It is clear that these two presumptions apply independently of each other and must therefore be applied independently upon proof of the facts that trigger their applications.

**[43]** It will be a strange working of the law if, despite being imposed by law to rebut a statutory presumption,the accused is relieved of such legal burden by the court deciding not to invoke the presumption merely because there is actual evidence of the fact presumed. That will effectively render the statutory presumption otiose and expose the Legislature to speculation that it had enacted the law without any rhyme or reason. That cannot be the case. As is often said, Parliament does not legislate in vain. The intention behind the statutory presumption is obvious, and that is to reverse the onus of proof.

**[44]** The practice by the prosecution of choosing either to invoke the presumption under s 37(d) or the presumption under section under s 37(da) probably stems from the decision in *Muhammed Hassan* which held that the presumption of 'possession' under s 37(d) cannot be used to invoke the presumption of trafficking under s 37(da). In other words, the presumption of trafficking under s 37(da) can only be invoked by affirmative evidence of possession and not by using the presumption of 'possession' under s 37(d).

**[45]** The new s 37A which came into force on 15 February 2014 seems designed to obviate this dilemma of choice faced by the prosecution. It provides as follows:

> 37A. Notwithstanding anything under any written law or rule of law, a presumption may be applied under this Part in addition to or in conjunction with any other presumption provided under this Part or any other written law.

**[46]** It is interesting to note that the Republic of Singapore has a similar but differently worded provision which has been in existence long before *Muhammed Hassan* was decided. Section 15(c) of the Singapore Misuse of Drugs Act 1973 provides:

> 15. Any person who is *proved or presumed* to have had in his possession more than
>
> (a) ...

A (b) ...

(c) 2 grammes of diamorphine (morphin) contained in any controlled drug:

(d) ...

shall, until the contrary is proved, be presumed to have had such controlled drug in
B his possession for the purpose of trafficking therein. (Emphasis added.)

**[47]** The decision in *Muhammed Hassan* must be understood in its proper context. First of all the Federal Court in that case was dealing with the presumption of possession in the first part of s 37(d) without touching on the
C second part.

**[48]** More importantly the court did not decide that where the presumption of trafficking under s 37(da) has been invoked by affirmative evidence of possession and not by using the presumption of possession under s 37(d), the
D presumption of knowledge as to the nature of the drug under the second part of s 37(d) ceases to have effect and becomes a dead letter of the law.

**[49]** There is also nothing in the judgment to say that where the
E presumption of knowledge as to the nature of the drug under s 37(d) has been triggered by proof of custody or control, the court can choose whether to invoke or not to invoke the presumption. In fact the judgment suggests otherwise.

F **[50]** We are mindful of the Federal Court decisions in *Emmanuel Yaw Teiku v Public Prosecutor* [2006] 5 MLJ 209; [2006] 3 CLJ 597; *Isidro Leonardo Quito Cruz v Public Prosecutor* [2013] 2 MLJ 1 and *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630 where certain passages in the judgments seem to suggest that where there is actual evidence of knowledge or trafficking, there is
G no need to invoke the presumptions under s 37(d) or s 37(da), as the case may be.

**[51]** We have gone through the judgments carefully and we find that the crux of the decisions where they touch on s 37(d) and s 37(da) was basically to
H reaffirm the rule against double presumption as decided in *Muhammed bin Hassan*, ie that the presumption of possession under s 37(d) cannot be used to invoke the presumption of trafficking under s 37(da). We do not think the ratio decidendi of the cases go beyond that.

I **[52]** With due respect, they are not authorities for saying that where the facts that trigger the presumptions under s 37(d) or s 37(da) have been established, the court can choose whether to invoke or not to invoke the presumptions. If at all, the observations made by the Federal Court on s 37(d) and s 37(da) are at best obiter because it was unnecessary for the court to decide whether it was

incumbent on the court to invoke the statutory presumptions when facts triggering their activations have been established. The authority that is directly on point is the Federal Court decision in *Zulkifli Arshad.*

**[53]** In *Emmanuel Yaw Teiku* the following passage can be found at para [14] of the judgment delivered by Richard Malanjum FCJ (now CJ of Sabah and Sarawak):

> Hence, under the Act there is no mandatory rule to require for the invocation of s 37(d) to establish the element of possession on a charge for trafficking of dangerous drug. Where the facts and circumstances warrant, it would be sufficient to establish actual possession cum knowledge from the totality of the evidence adduced.

**[54]** This passage must not be understood to mean that it is not mandatory to invoke the presumption of knowledge under s 37(d) upon proof of custody or control. All that it says is that it is not necessary to invoke the presumption under s 37(d) to establish possession. It must be a reference to the presumption of possession in the first part of s 37(d) as it was obviously made in the context of the rule against double presumption as decided in *Muhammed Hassan*.

**[55]** If it is incumbent on the court to invoke the presumption of trafficking upon proof of actual possession as decided in *Zulkifli Arshad*, it must likewise be incumbent on the court to invoke the presumption of knowledge as to the nature of the drug upon proof of actual custody or control.

*Burden to prove defence of no knowledge*

**[56]** The question of whether the presumption of knowledge under s 37(d) must be invoked upon proof of custody or control is of critical importance as it relates to the fundamental question of burden and quantum of proof and how the court should deal with the defence of no knowledge, if raised. The fact that it is a defence that is most commonly raised in drug trafficking cases under scores the importance of determining the true import of s 37(d).

**[57]** If the presumption under s 37(d) applies and is duly invoked by the court, the accused bears the legal (as opposed to evidential) burden of proving absence of knowledge on the balance of probabilities by admissible evidence: *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; [1968] 1 LNS 116 (see also *Baharom v Public Prosecutor* [1960] 1 MLJ 249; [1960] 1 LNS 9; *Liew Siew & Anor v Public Prosecutor* [1969] 2 MLJ 232; [1969] 1 LNS 90; *Chu Tak Fai v Public Prosecutor* [1998] 4 MLJ 246; [1998] 4 CLJ 789).

**[58]** If on the other hand the presumption does not apply, for example where the court decides not to invoke the presumption, the accused will be relieved of the legal burden of proving absence of knowledge. In fact he has no duty to

prove or to disprove anything. To earn an acquittal, all that he needs to do is to merely raise a reasonable doubt in the court's mind as to the truth of the prosecution's case. This is settled jurisprudence and *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82 is the locus classicus on the point.

**[59]** The distinction betweena legal and evidential burden of proof has always been there and failure to apply the correct burden can result in a serious miscarriage of justice. In *Oxford Dictionary of Law* (7th Ed), the distinction is explained in the following terms:

> A distinction is drawn between the persuasive (or legal) burden, which is carried by the party who as a matter of law will lose the case if he fails to prove the fact in issue; and the evidential burden (burden of adducing evidence or burden of going forward), which is the duty of showing that there is sufficient evidence to raise an issue fit for the consideration of the trier of fact as to the existence or non existence of a fact in issue.

**[60]** The practical effect of the distinction in the context of a criminal caseis demonstrated by the Privy Council decision in *Yuvaraj* where Lord Diplock delivering the advise of the Judicial Committee said that the consequence of a failure to rebut a statutory presumption of fact which forms a necessary factual ingredient of the offence would be a conviction. This is how His Lordship put it:

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are 'not proved'. But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist 'unless the contrary is proved'. *In such a case the consequence of finding that that particular fact is 'disproved' will be an acquittal, whereas the absence of such finding will have the consequence of a conviction.* (Emphasis added.)

**[61]** The case had been cited with approval by the Federal Court in *Ng Eng Kooi & Anor v Public Prosecutor* [1970] 1 MLJ 267 and *Public Prosecutor v Abdul Rahman Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 and by the then Supreme Court in *Cohen Lorraine Philis v Public Prosecutor* and *Ng Chai Kem lwn Pendakwa Raya* [1994] 2 MLJ 210; [1994] 2 CLJ 593. In *Cohen Lorraine Philis* the Supreme Court recognised that the law on statutory presumptions as stated in *Yuvaraj* has become 'part of our law'.

**[62]** In a drug trafficking charge, clearly knowledge is a necessary factual ingredient of the offence. Without proof of knowledge, there can be no possession in the criminal sense and without proof of possession there can be

no trafficking. For all intents and purposes,the defence of no knowledge is a defence that the accused was not even inpossession of the drug. The defence has nothing to do with rebuttingthe presumption of trafficking under s 37(da). Therefore, where no knowledge is raised as a defence and the accused fails to prove the defence on the balance of probabilities, he must as a matter of law be convicted of the offence charged, which is trafficking.

**[63]** This has to be the consequence because by failing to rebut the presumption of knowledge under s 37(d) and by adducing no evidence to prove that the drug was not for the purpose of trafficking, the accused necessarily fails to rebut the presumption of trafficking under s 37(da). To succeed in rebutting the presumption of trafficking, the accused must first admit to possession and then prove that the drug in his possession was not for the purpose of trafficking, as was done by the accused in *Cohen Lorraine Philis* and the accused in *Isidro Leonardo Quito Cruz*, to cite just two cases.

**[64]** Having said that we must hasten to add that he is still entitled to be acquitted of the trafficking charge if his explanation succeeds in raising a reasonable doubt in the prosecution's case on any other essential ingredient of the charge other than the facts presumed by s 37(d) and s 37(da), such as whether the drug was in his custody or control, the weight of the drug, the nature of the drug, the identity of the drug, or even his own identity. These are facts that are not presumed by the law and therefore the burden of proof is the lighter evidential burden of merely to cast a reasonable doubt in the prosecution's case: *Mat v PP*.

**[65]** In the instant case it must be remembered that the appellant was called upon to answer a trafficking charge and not a possession charge. His defence must therefore be directed at rebutting the presumption of trafficking rather than to try to convince the court that he was not in possession by reason of having no knowledge of the drug. But since he chose to put up the defence of no knowledge, then he must prove it on the balance of probabilities.

**[66]** In *Abdul Rahman Akif* the Federal Court in allowing the prosecution's appeal and reinstating the conviction and death sentence passed by the High Court found that since the respondent did not offer any explanation whatsoever to rebut the presumption of trafficking under s 37(da), the presumption therefore stood unrebutted.

**[67]** In our view the same consequence should follow where there is a failure to rebut the presumptionof knowledge under s 37(d) in cases where the defence to the trafficking charge is a defence of no knowledge. If the accused fails to rebut the presumption of knowledge, the question of whether he succeeds in rebutting the presumption of trafficking does not arise at all.

*Second ground*

**[68]** It was submitted that an adverse inference under s 114(g) of the Evidence Act 1950 ought to be drawn against the prosecution for failing to call Ofelia as a witness. We do not find any merit in the argument. In *Ong Hooi Beng & Ors v Public Prosecutor* [2015] 3 MLJ 812; [2015] 3 AMR 449 this court made the following observations at p 832 (MLJ); p 446 (AMR):

> As the burden of proof lies with the prosecution, it is entirely for the prosecution to decide whom to call and whom not to call as a witness subject of course to its overriding duty to conduct the prosecution with utmost candour and fairness. If the prosecution knows that a particular witness from whom a statement has been recorded has not told the truth, will not tell the truth and will in fact lie to the court, there is no point in calling such witness. In fact to do so would be to pervert the course of justice.

**[69]** Unless it can be shown that the prosecution was actuated by oblique motive and was suppressing evidence favourable to the appellant, no adverse inference should be drawn against the prosecution. There was no such suggestion in this case. More importantly, even without the evidence of Ofelia, the prosecution already had sufficient credible evidence to establish a prima facie case against the appellant at the close of its case.

**[70]** In law no adverse inference can be drawn against the prosecution for failure to call a witness when the prosecution has discharged its burden. As Yong Pung How CJ said in *Chua Keem Long v Public Prosecutor* [1996] 1 SLR 510 at pp 523–524:

> The appellant's contention is that the failure of the prosecution to adduce evidence of those other gamblers meant that the court could presume that the evidence would have gone against the prosecution, that there is no such visits.
>
> Such arguments are commonly made. Commonly too, such arguments are without merit. The court must hesitate to draw any such presumption unless the witness not produced is essential to the prosecution's case. Any criminal transaction may be observed by a number of witnesses. It is not necessary for the prosecution to produce every single one of those witnesses. All the prosecution need to do is to produce witnesses whose evidence can be believed so as to establish the case beyond reasonable doubt. Out of a number of witnesses, it may then only be necessary to bring in one or two; as long as those witnesses actually produced are able to give evidence of the transaction, there is no reason why all the rest should be called, nor why any presumption should be drawn that the evidence of those witnesses not produced would have been against the prosecution.

*Third ground*

**[71]** The appellant's complaint under this ground is that the learned trial judge failed to consider the defence explanation 'thoroughly'. Having gone

through the record of appeal and the grounds of judgment at pp 206–219, we found no substance to the complaint. It is clear that the learned judge had considered with meticulous care every material aspect of the defence explanation at the end of which she concluded as follows:

> In the face of cogent evidence from the prosecution that (i) the accused had pointed to the box P12 before he showed the consignment number in the hand phone to PW3 (ii) the accused had collected P12 and carried it to the car (iii) the accused had thrown P12 on to the driver's seat upon being detained by the police (iv) the accused tried to get away when detained and (iv) the evidence of the accused and DW2 that the accused having merely collected P12 on behalf of Ah Kiong at the behest of Ofelia was an afterthought and improbable, I found and held that the defence had not succeeded in rebutting, on a balance of probabilities, the presumption of trafficking in s 37(da) of the DDA 1952.

**[72]** For all the reasons aforesaid, we found no merit in the appellant's appeal. Accordingly we dismissed the appeal and affirmed the conviction and death sentence imposed by the High Court.

*Appeal dismissed.*

Reported by Afiq Mohamad Noor